IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-329

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts, ET AL., *Appellants*

v.

WILLIAM BAIRD, ET AL., *Appellees*

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AMICUS CURIAE

GEORGE E. REED
General Counsel
PATRICK F. GEARY
Assistant General Counsel

Attorneys for
United States Catholic Conference

1312 Massachusetts Avenue, N.W.
Washington, D.C. 20005
202/659-6690

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MOTION FOR LEAVE TO FILE BRIEF OF UNITED STATES CATHOLIC CONFERENCE AMICUS CURIAE

The United States Catholic Conference respectfully moves this Court for leave to file a brief *amicus curiae* in this case.

IDENTIFICATION AND INTEREST OF THE AMICUS

I.

Identification of the Amicus

The United States Catholic Conference is a non-profit corporation and an agency through which the Catholic Bishops of the United States collaborate with other members of the Church—priests, religious and laity—in areas where voluntary collective action on an interdiocesan and national basis can benefit the Church and society.

USCC is an agency of the Catholic Bishops of the United States. Its predecessor, established in 1919, was known as the National Catholic Welfare Conference. The prime purpose of USCC is to unify and coordinate activities of the Catholic people of the United States in programs and works of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, civic education, youth activities, communications and public affairs, with emphasis on the preservation of religious liberty in America.

II.

Interest of the Amicus in This Case

This case affects relationships fundamental to our society. It is the conviction of this *amicus* that the Court can only be well served in matters of such wide import when it has assistance from all quarters. Thus, it is a spirit of service which prompts this *amicus* to make this submission.

GEORGE E. REED
General Counsel
PATRICK F. GEARY
Assistant General Counsel

Attorneys for
United States Catholic Conference

1312 Massachusetts Avenue, N.W.
Washington, D.C. 20005
202/659-6690

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BRIEF OF UNITED STATES CATHOLIC CONFERENCE AMICUS CURIAE

ARGUMENT

The question before this court is not whether Massachusetts may constitutionally require a parental consultation prior to the abortion of an unmarried minor but whether Massachusetts can constitutionally avoid doing so. A parent has a long-recognized constitutional right to nurture, education and guide his child. It is the view of this *amicus* that the state is without constitutional authority to ignore these fundamental rights. While it is true that this Court has held, in *Planned Parenthood* v. *Danforth,* that a parent does not have the right to control the abortion decision of an unmarried minor, it did not hold that a parent has no right to participate in such a decision. The same

right of privacy which is said to ground the practice of abortion also guarantees the right of a parent to counsel an unmarried minor.

There is, we submit, a great wisdom in requiring the state to respect the independent dynamism of the family. The family is essentially a biosocial institution whose existence comes about through the workings of human reproduction. It remains in existence because of physical and psychological interdependence among family members. These qualities, of course, are not related to any political or constitutional system and may be said to "pre-exist" such systems.

Moreover, people are not legal abstractions. Their lives are not a cold balancing of options. The irrational and emotional are just as much a part of human life as the rational. Family members may indeed fail to resolve their disputes according to abstract "justice"—yet the solutions at which they arrive may in fact ultimately work. Interpersonal relations are just that—relations between persons; and persons have emotional and psychological needs which cannot be articulated, let alone resolved, by the legal process.

Historically, the need for familial independence has won recognition under our legal system. The Supreme Court has repeatedly found that government has a constitutional duty to allow the family to make certain decisions free from government interference. In *Meyer* v. *Nebraska* (1923),[1] the court held that government could not prohibit a family from obtaining foreign language instruction for its children. In *Pierce* v.

[1] Meyer v. Nebraska, 262 U.S. 390 (1923), n. 15.

Society of Sisters[2] (1925), it held that Oregon could not completely eliminate the right of parents to obtain a private education for their children. In *Griswold* v. *Connecticut*[3] (1965), the Court held that government could not prohibit the use of contraceptives by unmarried couples and struck down a state law which attempted such a prohibition.

The court has continued to act to protect the institutional integrity of the family. In *Wisconsin* v. *Yoder*[4] (1972), the Supreme Court held that Wisconsin could not compel parents of Amish children to send their children to school beyond the eighth grade.

> "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."

In *Moore* v. *Cleveland*[5] (1977), the court struck down a zoning ordinance in East Cleveland which prohibited the cohabitation of a grandmother with her grandchildren in a single family residential area.

> "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."

[2] Pierce v. Society of Sisters, 268 U.S. 510 (1925), n. 16.

[3] Griswold v. Connecticut, 381 U.S. 479 (1965).

[4] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[5] Moore v. East Cleveland, 97 S. Ct. 1932 (1977).

Moreover, decisions such as *Meyer* v. *Nebraska, Pierce* v. *Society of Sisters, Wisconsin* v. *Yoder, Griswold* v. *Connecticut, Loving* v. *Virginia,*[6] *Skinner* v. *Oklahoma*[7] and *Boddie* v. *Connecticut*[8] accept, as a premise, the view that the family is something more than the sum of its aggregate members, an organic view. Within this tradition, the cases of *Pierce* v. *Society of Sisters, Meyer* v. *Nebraska* and *Wisconsin* v. *Yoder* not only confirm the Court's recognition of the organic view of the family but also the state's need and, in fact, duty to give protection and support to the familial undertaking.

The significance of this view of the family is evident in the remarks of Justice McReynolds in *Pierce* v. *Society of Sisters.*

> "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

The Court has traditionally treated marriage and family as being coeval. Recently this organic conception of the family has been manifested and expanded by *Stanley* v. *Illinois*[9] and *Moore* v. *East Cleveland.* These decisions are witness to the fact that the state's obligation to the family extends to *de facto* as well as *de jure* families.

It is of critical import to note that these cases dealt with rights to be exercised by the family *qua* family.

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[6] Loving v. Virginia, 388 U.S. 1 (1967) n. 18.

[7] Skinner v. Oklahoma, 316 U.S. 535 (1942), n. 19.

[8] Boddie v. Connecticut, 301 U.S. 371 (1971).

[9] Stanley v. Illinois, 405 U.S. 645 (1972).

They did *not* deal with the internal policy or decision-making process within the family. The decisions protect the integrity of the family as an institution while at the same time refraining from any involvement in the interpersonal side of family life. In *Meyer* v. *Nebraska,* for example, the court did not deal with the issue of who in the family has a right to decide whether a child shall receive foreign language instruction nor did it consider whether the child has the right to resist such training. Similarly, the court did not involve itself in questions of family decision-making in *Pierce* and *Griswold.*

Now, however, there is a line of cases in which the court *has* begun to enter the interpersonal side of family life—specifically, *Roe* v. *Wade*[10] and *Doe* v. *Bolton*[11] (1973), *Planned Parenthood* v. *Danforth*[12] and *Baird* v. *Bellotti* (1976).[13] It has sought to align these cases with *Meyer, Pierce* and *Griswold* by virtue of the "privacy" doctrine. However, the privacy at issue in those earlier cases was essentially a familial right. By contrast, the right of privacy emphasized by the abortion cases and their successors is essentially an individualistic right. The cases in the *Meyer/Pierce* line protect the family from government interference but do not seek to determine the *locus* of decision-making in the family. The abortion cases and their progeny establish individual, not familial rights. Furthermore, in *Planned Parenthood* and *Baird* v. *Bel-*

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[10] Roe v. Wade, 410 U.S. 113 (1973).

[11] Doe v. Bolton, 410 U.S. 179 (1973).

[12] Planned Parenthood v. Danforth, 420 U.S. 918 (1975).

[13] Baird v. Bellotti, 428 U.S. 132 (1976).

lotti, the court seeks to involve the government in the decision-making process within the family.

The court's new view of privacy as an individual rather than a familial right took shape in a line of *obiter dicta* beginning with remarks by Justice Brennan in his opinion in *Eisenstadt* v. *Baird* [14] (1972). He described marriage as an association of individuals.

> "If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child . . . the marital couple is not an independent entity with a mind and heart of its own. (Emphasis in original.)

Prior to this time the court had repeatedly recognized marriage as an institution which was made up of individuals but which took on a legal significance of its own. Since then it has increasingly favored a highly individualistic view. In *Roe* v. *Wade* the court found that the decision whether to bear or abort belonged to the woman *alone:* it was an individual decision, not a familial one.

Thus, these recent decisions of the Court have had the effect of politicizing the family. Rather than insuring an area of privacy, the court's decisions in cases beginning with *Eisenstadt* v. *Baird* have had the net effect of bringing government into disputes previously reserved for nonpolitical resolution.

Such a role can hardly be described as neutral, nor can it be said to protect the zone of private interest

[14] Eisenstadt v. Baird, 405 U.S. 438 (1972).

with which the court was concerned in *Meyer, Pierce* and *Griswold.* Rather, the "privacy" envisaged in the abortion cases actually signals government's entry into the interpersonal side of the family structure. The full, paradoxical import of these decisions is to suggest that family decisions about reproductive matters are ultimately social decisions, and that the way such decisions are reached is a matter for social and judicial determination.

CONCLUSION

Under traditional analysis of the right of privacy the statute before this Court would be treated as a codification of the pre-existing and constitutionally protected right of a parent to instruct and counsel an unmarried minor. Moreover, such an analysis would find that the state is without constitutional authority to abrogate such rights in the absence of compelling justification. It is the view of this amicus that a proper adjudication of the instant case would recognize that the statute is not only permissible but also constitutionally mandated by the familial right of privacy.

Respectfully submitted,

GEORGE E. REED
General Counsel
PATRICK F. GEARY
Assistant General Counsel

Attorneys for
United States Catholic Conference

1312 Massachusetts Avenue, N.W.
Washington, D.C. 20005
202/659-6690

amicus brief

In the
Supreme Court of the United States

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No. 78-329

FRANCIS X. BELLOTTI,
ATTORNEY GENERAL OF THE
COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS

v.

WILLIAM BAIRD, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, THE LUTHERAN CHURCH (MISSOURI SYNOD), THE MICHIGAN DISTRICT, CHRISTIAN REFORMED CHURCH IN NORTH AMERICA, AND THE CHURCH OF JESUS CHRIST OF THE LATTER DAY SAINTS, IN SUPPORT OF APPELLANTS FRANCIS X. BELLOTI, *ET AL.*

Of Counsel:
ROBERT A. DESTRO
ROBERT M. ANDERSEN
Catholic League for Religious
and Civil Rights
1100 West Wells, Suite 501
Milwaukee, Wisconsin 53233
Phone: (414) 289-0170

STUART D. HUBBELL
Eighth at Boardman Avenue
Traverse City, Michigan 49684
Phone: (616) 947-9090
Attorney for *Amici Curiae*

In the
Supreme Court of the United States

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APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MOTION FOR LEAVE TO
FILE BRIEF AMICUS CURIAE

Four organizations, the Catholic League for Religious and Civil Rights, the Lutheran Church (Missouri Synod), the Michigan District, Christian Reformed Church in North America, and the Church of Jesus Christ of the Latter Day Saints, hereby respectfully move this Court for leave to file a joint brief *amicus curiae* in this case in support of Appellants Francis X. Bellotti, *et al.* The consent of attorneys for Appellant, Appellant/Inter-

venors and Appellee/Intervenors has been obtained. Attorney for Appellees has failed to respond to our request for consent.

The interest of *amici* in this case is twofold. First, each *amicus* is an organization concerned with parental rights and the care, custody, nurture, and education of children. This case raises important issues of a state's right to require parental notification and consultation before abortion surgery may be performed on certain minors. *See* Jurisdiction Statement of Appellants Francis X. Belloti *et al* . at 5-6.

The *amici* have extensive experience in the areas of education, domestic relations, parental rights, and parent/child relationships. *Amicus* Catholic League for Religious and Civil Rights, for example, is a tax-exempt organization involved in many legal cases respecting constitutional and civil rights of parents. *Amici* Michigan District, Christian Reformed Church in North America and the Lutheran Church (Missouri Synod) have participated as *amici* in other parental rights cases. Thus, in the instant case, *amici* would support the challenged legislation from the perspective of parents of minor children seeking abortion surgery. The various governmental appellants will approach the issues from a different perspective. In their official capacity as counsel for various governmental entities, appellants will exercise their constitutional duty to uphold and defend a state statute which is claimed to be constitutionally valid. It is the contention of *amici* that their participation in the instant case is necessary for the full and adequate exposition of the parental rights issues in the case.

Secondly, some of your *amici* are involved in cases which present parental rights issues either identical to or analogous to the issues in the instant case. The Lutheran Church-Missouri Synod and the Michigan District, Christian Reformed Church in North America are acting as *amici* in *Doe v. Irwin*, No. G–75–142 CA (W.D. Michigan) now pending before the United States Court of Appeals for the Sixth Circuit (No. 78–1056) and counsel for the Catholic League is attorney of record for a group of parent-intervenors in *Akron Center for Reproductive Health v. City of Akron, Ohio*, Case No. C78–155A (N.D. Ohio Pending). *Doe v. Irwin* involves the constitutionality of state action to exclude or prevent informing parents regarding their minor children's participation in contraceptive education and distribution programs. The *Akron Center* case involves an ordinance similar to the statute in the instant case. It requires parental consultation for all minors, except those emancipated, and consent for minors "of tender years" – defined as those minors under age fifteen. A decision in the instant case clearly has relevance to the disposition of other cases of vital concern to your *amici*.

For the foregoing reasons, *amici* move this Court for leave to file a brief *amicus curiae* in this case.

Respectfully submitted,

Stuart D. Hubbell
Attorneys for *Amici*
Catholic League for Religious and
Civil Rights, The Lutheran Church
(Missouri Synod), Michigan District,
Christian Reformed Church in North
America, and the Church of Jesus
Christ of the Latter Day Saints

December 14, 1978.

CERTIFICATE OF SERVICE

I, Stuart D. Hubbell, attorney for *Amici Curiae* in this case, being a member of the Bar of the Supreme Court of the United States, do hereby certify that I have caused a true and correct copy of the foregoing motion to be served upon Appellants, Appellant/Intervenors, Appellee/Intervenors, and Appellees, they being the parties of record by depositing copies of said motion in a United States Post Office mailbox, with first-class postage pre-paid addressed to: Francis X. Bellotti, Office of the Attorney General, the Commonwealth of Massachusetts, John W. McCormack State Office Building One Ashburton Place, Boston, Massachusetts 02108, and Garrick F. Cole, Office of the Attorney General, the Commonwealth of Massachusetts, John W. McCormack State Office Building, One Ashburton Place, Boston, Massachusetts 02108, attorneys for Appellants; Brian Riley, 40 Court Street, Boston, Massachusetts 02108, attorney for Appellant/Intervenor Jane Hunerwadel; John Henn, Foley, Hoag & Eliot, 10 Post Office Square, Boston, Massachusetts 02108, attorney for Appellee/Intervenor Planned Parenthood League of Massachusetts, *et al.*; and Joseph Balliro, 1 Center Plaza, Boston, Massachusetts 02108; attorney for Appellees, this 14th day of December 1978.

Stuart D. Hubbell
Attorney for *Amici Curiae*